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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

NO. 1437

ARMSTRONG EQUIPMENT COMPANY, a corporation,

Petitioner,

vs.

CLARK EQUIPMENT COMPANY, a corporation;
CLARK EQUIPMENT CREDIT CORPORATION, a corporation; and
CLARK RENTAL CORPORATION, a corporation,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

1.

The Petitioner prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit in the above entitled cause.

(a) OPINIONS BELOW

Court of Appeals. The opinion of the Court of Appeals, as yet unreported, appears in Appendix A, infra, pp. 18 to 24.

No opinion was rendered by the Court of Appeals on its

Order denying Petitioner's Application for a Rehearing, which appears in Appendix B, infra, pp. 24 to 26.

District Court. The injunctive decrees of the District Court involved here are set forth in Appendices C and D, respectively, infra, pp. 26 to 33; they were not reported.

(b) JURISDICTION

The judgment or decree of the Court of Appeals sought to be reviewed was entered on September 1, 1970. The judgment or decree denying Petitioner's timely Application for Rehearing was entered on December 7, 1970. The jurisdiction of this Court is invoked under 28 U.S.C. §1254 (1).

(c) THE QUESTIONS PRESENTED

In a diversity action by Respondents to enforce the provisions of a security instrument covering certain personal property, pursuant to the provisions of the Alabama Uniform Commercial Code,[1] the District Court, although the Respondents had not complied with Alabama Statutory and decisional laws relating to the sequestration, attachment and seizure of property before trial on the merits, issued a preliminary mandatory injunction requiring Petitioner to deliver possession to Respondents for disposition and sale of some $2,000,000 worth of such property, and to remit to the Clerk of the Court certain moneys received by Petitioner from its customers.

The questions presented are:

No. 1. Whether the provisions of the Alabama Uniform Commercial Code requiring a debtor after default to assemble and make available to a secured party property covered

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[1] The Alabama Commercial Code is patterned after the Uniform Commercial Code now in effect, with slight variations, throughout the United States, except Louisiana.

by a security instrument, are within the ambit of Alabama's legal and equitable provisional remedies for the sequestration, attachment and seizure of personal property before trial on the merits; and if so, whether a Federal court in a diversity action seeking to enforce such security instrument is, under the Erie doctrine and Rule 64 of the Federal Rules of Civil Procedure, required to follow the State-created remedies and substantive laws in ordering the debtor at a preliminary hearing to assemble, make available and deliver possession to the creditor certain machinery, parts and rental contracts, and in sequestering certain funds of the Petitioner.

No. 2. Whether the judgment of the Court of Appeals that the preliminary mandatory injunction was "the only appropriate remedy for the enforcement of the terms of the agreement in view of the location of the property in five different states" is erroneous both as a statement of the law as well as of fact.

No. 3. Whether the District Court in issuing the preliminary mandatory injunction granting to Respondents practically all relief relating to the possession of ordinary personal property to which they would be entitled on trial on the merits, with the practical effect of putting Petitioner out of business on an inadequate bond at a preliminary stage of the proceedings, in the absence of a showing of irreparable harm or damage, so far departed from the traditional rules of equity jurisprudence followed in the state and federal courts as to constitute a gross abuse of power or discretion, if any exists here.

No. 4. Whether the assailed injunctive decree and the order of the Court of Appeals affirming the same infringe upon the Petitioner's Constitutional right to due process and trial by Jury.

(d) STATUTES INVOLVED

This case involves:

(i) Sections 1-101, 1-102, 1-103, 1-201 (1), 1-201-(34), 9-501 (1), (2), (3), (5), and 9-503 of the Alabama Uniform Commercial Code, Title 7A Code of Alabama 1940, as Recompiled and Amended.

(ii) Sections 918 through 931 Title 7, Code of Alabama 1940, as Recompiled and Amended, dealing with the recovery of personal chattels in specie.

(iii) Sections 845 through 850 Title 7, Code of Alabama 1940, as Recompiled and Amended, dealing with Attachments.

(iv) Sections 302, 309, 315 and 316 Title 7, Code of Alabama 1940, as Recompiled and Amended, dealing with the issuance of Writs of Equitable Attachment, Ne Exeat, etc. in Courts of Equity.

(v) Alabama Equity Rule 118 adopting English Chancery Rules.

(vi) Sections 64 and 70 of the Federal Rules of Civil Procedure.

(vii) Seventh Amendment to the Constitution of the United States.

These are reprinted in pertinent part in Appendix F, infra, pp. 33 to 50.

(e) STATEMENT OF THE CASE

The Complaint

On June 19, 1969, the Respondents, foreign corporations

engaged in the manufacture, sale, distribution and financing of heavy road construction machinery, filed an action, founded on diversity of citizenship and amount, against Petitioner, an Alabama corporation having its principal and other places of business only in Alabama, and being the franchised distributor of one of the Respondents in Alabama, to specifically enforce the provisions of a security agreement[2] and the remedies accorded them by the Uniform Commercial Code. Averring a default by Petitioner in the payment of four pieces of such machinery, and a refusal to deliver on demand possession of all similar "floor plan" equipment, "rental fleet" equipment and leases covering the same, and certain parts, upon which there was claimed to be due Respondents by acceleration because of such alleged default the sum of some $1,800,000, and further averring a belief in the continuance of such default unless enjoined,

Respondents prayed (i) for the issuance of a preliminary injunction enjoining Petitioner from violating the security agreement, (ii) for a preliminary injunction enjoining Petitioner to assemble the equipment, parts and rental contracts, all alleged to be in possession of Petitioner at its places of business in Alabama, and make same available to Respondents for sale or other disposition, and (iii) for a deficiency judgment.

The Injunctive Decree of June 27, 1969

Within a few days thereafter, the Court entered a preliminary injunction enjoining Petitioner from violating the terms of the security agreement, to make certain remittances to Respondents, and to hold certain moneys in trust. Since basically the decree did no more than maintain the

[2] Pertinent parts of the Security Agreement are reprinted in Appendix G, infra, p. 53.

status quo between the parties, Petitioner fully complied therewith and elected not to appeal therefrom.

The Answer of Petitioner

On September 3, 1969, Petitioner filed its verified answer setting out certain counterclaims and raising a number of defenses. Among these were waiver of the alleged default, extension of the debt, estoppel, adequacy of legal remedy, usury and non-enforceability of Respondents' claims for failure to qualify to do business in Alabama as foreign corporations.[3]

Petitioner demanded trial by jury. A motion to strike the jury demand was filed by Respondents, but the same has not yet been acted upon by the Court.

The Mandatory Injunction of September 4, 1969

Thereafter, on September 4, 1969, at a further preliminary hearing, the District Court summarily, and without compliance with the statutory and substantive laws of Alabama relating to the seizure of property before trial on the merits, entered a preliminary mandatory injunction requiring Petitioner to forthwith assemble some thirty units of machinery weighing from 5 to 60 tons each and certain parts having a combined value of some $1,000,000, as well as rental contracts also having a value of some $1,000,000, all located at Petitioner's three separate business premises in Alabama, and to deliver possession thereof to Respondents at each of the business premises where the same may be located.

This order was entered not only without further evidence from the Respondents, but even after substantial evidence

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[3] *Chattanooga National Building & Loan Ass'n. v. Denson* 47 L. Ed. 870, 189 U.S. 408.

from Petitioner showing that it fully complied with every provision of the status quo injunctive decree of June 27, 1969, that it was a solvent, going concern, and that there was considerable merit to the several defenses interposed by Petitioner in its answer.

Finally, the order contained no finding that Respondents were without an adequate remedy at law or that they will suffer irreparable harm or damage unless the additional injunctive relief were granted.

Respondents were required to post a bond in the amount of $1,000,000, although the property to be surrendered had a value of some $2,000,000. Petitioner was given the right to make a bond for a similar amount to avoid the mandate of the injunction, which it could not and did not make.

Armed with this decree, Respondents promptly assumed possession of all this property and after removing them from Petitioner's premises sold and disposed the same.

A timely appeal from this injunctive order followed. On September 1, 1970, the Court of Appeals for the Fifth Circuit affirmed the injunctive order of the District Court. A Petition for a Rehearing en banc was summarily denied by the same three judge panel (Appendices A and B and C, infra, pp. 18 to 28.

REASONS FOR GRANTING THE WRIT

I

THE COURT OF APPEALS HAS DECIDED AN IMPORTANT STATE QUESTON IN CONFLICT WITH APPLICABLE STATE LAW.

The Court of Appeals holds that the Uniform Commercial Code does not attempt to specify the kind of action which is available to a secured party under § 9-503 for the enforcement of the provision requiring a debtor to assemble

property and make same available to the creditor, and that no one possessory action in detinue provides an adequate remedy. Hence, the ultimate erroneous conclusion that "Neither the Federal Rules of Civil Procedure nor the Erie doctrine deprive Federal courts in diversity cases of the power to enforce State-created substantive rights by well-recognized equitable remedies even though such remedy might not be available in the courts of the State." And, finally, that the injunctive relief granted was the "only appropriate remedy. . . ."

This is patently wrong for the following reasons:

(a) § 9-503 OF THE CODE CONTEMPLATES RESORT TO EXISTING STATE PROCEDURES OUTSIDE THE CODE.

§ 9-501 of the Code provides that a secured party may reduce his claim to judgment, foreclose or otherwise enforce the security interest "by any available judicial procedure." This, according to the official Code comment, means a procedure "outside this article, which state law may provide." To the same effect is Bender's Uniform Commercial Code service, Sections 8.03 and 8.08 (4), and *In Re: Yale Express System, Inc.*, 250 F.Supp. 249, reversed on other grounds *In Re Yale Express System, Inc.*, 370 F.2d 433.

(b) ALABAMA PROVIDES ADEQUATE REMEDIES FOR THE SEQUESTRATION, ATTACHMENT AND SEIZURE OF PROPERTY BEFORE TRIAL, BOTH AT LAW AND IN EQUITY. AMONG THESE ARE:

(i) Statutory proceedings at law in detinue (Appendix E (ii)) which combine the beneficial incidents of both detinue and replevin as these remedies were understood at common law. *Rich v. Lowenthal,* 99 Ala. 487, 13 So. 220. The remedies provided for the enforcement of decrees, in detinue, such as the Writ of Distringas *(Scott v. Howard,* 215 Ala. 590, 112 So. 194), and Contempt *(Muscogee Motor*

Company v. Cook, 190 So. 71, 238 Ala. 178) supplemented by those under Federal Rule 70, are all embracing and as adequate as could be devised to enforce the provisions of the Code, including the duty to assemble property and make same available to a secured party;

(ii) Writs of attachment (Appendix E (iii)) to seize the property of a debtor for the enforcement of debts under various circumstances therein set out; and

(iii) Writs of equitable attachment, ne exeat and other miscellaneous remedies in courts of equity (Appendix E (iv)).

(c) ALABAMA DOES PROVIDE AN ADEQUATE REMEDY IN ONE POSSESSORY ACTION.

The entire rationale of the Court of Appeals that no one possessory action would provide an adequate remedy is based upon a totally unfounded assumption that the property repossessed was located in five different states. This is contrary to the undisputed record and the findings of fact by the District Court (Decree of June 27, 1969) that, while the equipment in the hands of lessees was located in five different states, the property sought to be repossessed was "located in Birmingham, Montgomery and Mobile, Alabama"; and is contrary to the findings of fact in the decree of September 4, 1969, complained of, which enjoins Petitioner to deliver to Respondents only such property which is located in Alabama, and which expressly excludes "equipment in possession of lessees." Petitioner was indeed ordered to deliver possession to Respondents of the rental contracts covering equipment in the hands of lessees, but these contracts were in possession of Petitioner in Alabama, and were re-coverable in one possessory action along with the other property.

But even if it were true that the property was located in

five different states, Petitioner, an Alabama corporation, with its principal and only places of business in Alabama, was sueable in one possessory action there, no matter where the property was located. *Morrow v. Nordell S. Hardware Company,* 51 So. 766, 165 Ala. 331; *Cobb v. National Lead,* 215 F.Supp. 48; and even if it were necessary to file several possessory actions, it would not affect the adequacy of the legal remedy, since the doctrine of multiplicity of suits does not apply to a multitude of suits. *Persons v. Summers,* 151 So.2d 210, 274 Ala. 673; *Robique v. Lambert,* 114 F.Supp. 305, affirmed 214 F.2d 3 (5th Cir.) cert. denied 99 Law Ed.718; 348 U.S. 915, 75 S.Ct. 297.

(d) In Alabama, as in Other Jurisdictions, the Function of an Injunction is Not to Take Property Out of Possession of One and Put it in Another.

It is the rule of almost universal application that where the title or right of possession is in dispute an injunction will not issue to take personal property out of the possession of one party and put it in possession of another. *Yellow Pine Export Company v. Sutherland,* 141 Ala. 664, 37 So. 922; *Clayton v. Allen,* 93 So. 543, 207 Ala. 667. This principle applies with special force in the Federal courts, since it involves also the constitutional right to trial by jury. *Jones v. McKenzie,* 122 Fed. 390 (7th Cir.) *Charles Simkin & Sons, Inc. v. Massiah,* 289 F.2d 26 (3rd Cir.) *Beacon Theaters v. Westover,* 359 U.S. 500; 3 Law Ed.2d 988, 79 Sup.Ct. 948.

(e) The Holding by the Court of Appeals That the Duty of the Debtor to Assemble Property and Make It Available to the Creditor is Something Different from the Right to Take Possession is Totally Unrealistic.

The reality here is that all of the equipment, weighing from five to sixty tons each, located on the business

premises of Petitioner in Alabama, neither needed nor were susceptible to assembly, and that, in any event, the order complained of required, in addition, that *possession* of the equipment be "delivered to plaintiffs for sale, lease or other disposal . . ." and that Petitioner "deliver forthwith to the Plaintiffs the rental contracts on the Rental Fleet described in Exhibit A. . . ." Furthermore, it is clear that the provision as to assembly is a mere step in the process of taking possession under § 9-503.

Assuming, arguendo, that the distinction is valid, it cannot support that part of the assailed decree requiring Petitioner to assemble the rental contracts, which constitute some $1,000,000.00 in value of the property involved here, for the simple and uncontrovertible reason that the Security Agreement (Appendix G, infra, p. 53) does not authorize Respondents to require Petitioner to assemble and make available to them the rental contracts and the Commercial Code does not give Respondents such right unless "the security agreement so provides . . ." (Section 9-503). The word "collateral" as the same appears in the assembly provision, Section 9 of the Security Agreement, and is defined in Sections 2.7 and 2.8 thereof, does not by its terms include rental contracts, the same being expressly excluded therefrom.

(f) The Court of Appeals Basically Misinterprets the Code in Assuming that § 9-503 Provides for Provisional Remedies Which may be Exercised ry a Secured Party Before Trial on the Merits, Freed of All Restraints of Existing Alabama Laws, Whether at Law or in Equity.

There is nothing in the Uniform Commercial Code to justify such drastic conclusion. The Code does not declare open season against debtors, as the Court of Appeals

implies. A party who cannot take possession of property without a breach of the peace must proceed by judicial action. Once such an action is instituted, a secured creditor has no more specially favored remedy by which to seize property before trial than any other litigant. Thus, before property may be seized under a writ of detinue, a secured party must, like any other litigant, make certain affidavits, furnish certain prescribed bonds conditioned as provided by statute, one of which must be in double the value of the property to be seized. Again, under Alabama substantive law, a party in a court of equity desiring to seize property before trial must show that the same is in danger of being wasted, carried beyond the jurisdiction of the court, or otherwise disposed of and must make bond for double the value of the property to be seized, and conditioned as required by statute.

No such allegations were made in the complaint here, no such affidavits were filed, no such findings of fact were made by the court, and no such bonds were required or filed. Compliance with these statutory laws must be had to invoke the jurisdiction of the court and noncompliance, at law or in equity, renders the writ issued thereunder a nullity. *McKenzie v. Bentley,* 30 Ala. 139; *Davis v. Elba Bank & Trust Company,* 106 So. 595, 214 Ala. 100.

This is not to say that a mandatory injunction may not be issued on final hearing on the merits, or even preliminarily, in support of, or ancillary to, a possessory action at law either in the State or Federal court. It is clear, however, that under Alabama law, the remedy of a mandatory injunction cannot be employed in lieu of the action at law. *Priebe v. Farmer's Union Warehouse Company,* 159 So. 694, 230 Ala. 273.

II

THE INJUNCTIVE DECREE OF THE DISTRICT COURT, AND THE DECISION OF THE COURT OF APPEALS AFFIRMING THE SAME, ARE IN CONFLICT WITH THE DECISION OF THE EIGHTH CIRCUIT IN *Baxter v. United Forest Products Company*, 406 F.2d 1120, CERT. DENIED, 394 U.S. 1018, 2 LAW ED. 2ND 42, 89 S. CT. 1635, AND THE DECISION OF THIS COURT IN *DeBeers Consol. Mines v. United States* 325 U.S. 212, 65 S. CT. 1130, 89 L. ED. 1566.

Here, as in *Baxter*, the Court sequestered property without compliance with state statutes governing attachments and improvised procedures outside these laws; and here, as in *De Beers*, there is the question whether the requirement by the District Court that Petitioner proffer a $1,000,000 bond, outside the statutory scheme, to avoid the mandate of the injunction can be justified in the long history of equity jurisprudence. The rationale of the Court of Appeals is contrary to both these decisions.

III

THE COURT OF APPEALS HAS PROMULGATED A FEDERAL EQUITABLE REMEDIAL RIGHTS DOCTRINE AS IT APPLIES TO ACTIONS UNDER THE UNIFORM COMMERCIAL CODE, AND HAS THUS DECIDED A FEDERAL QUESTION IN A WAY IN CONFLICT WITH ERIE AND OTHER APPLICABLE DECISIONS OF THIS COURT.

The Court of Appeals, yielding to the "impulse to freedom from the rules that control State courts regarding State-created rights" referred to in *Guaranty Trust Company v. York*, 326 U.S. 99, 89 L.Ed. 2079, 65 Sup.Ct. 1464, has adopted the outmoded Federal equitable remedial rights doctrine. Indeed, while the Court of Appeals appears to

rely on *Guaranty,* it adopts as law that which *Guaranty* expressly rejects. For, freeing itself from Erie and Rule 64 of the Federal Rules of Civil Procedure, the court below has become entangled with "terminological niceties" leading to a mutilating construction of the Uniform Commercial Code, in order to justify the application of a so-called Federal equitable remedy.

(a) PROVISIONAL REMEDIES FOR THE SEIZURE OF PROPERTY BEFORE TRIAL ARE GOVERNED BY THE LAW OF THE STATE IN WHICH A DISTRICT COURT IS HELD.

Under Federal Rule 64, it is the current law of the State which determines what type of claim warrants the seizure of person or property, what affidavits and undertakings are necessary, and what property is subject to seizure. Moore's Federal Practice Volume 2, 2nd Ed., Sec. 2.09 and Volume 7, Sec. 64.07 (1) and (2).

(b) ALABAMA DOES PROVIDE A REMEDY IN EQUITY FOR THE SEIZURE OF PROPERTY BEFORE TRIAL. CONTRARY TO THE IMPLICATION BY THE COURT OF APPEALS, COURTS OF EQUITY IN ALABAMA PROVIDE AMPLE REMEDIES FOR THE SEISURE OF PROPERTY BEFORE TRIAL.

We have already seen that the Uniform Commercial Code does not purport to provide provisional remedies. A party seeking to foreclose a security interest in a court of equity and desiring to seize property before trial may do so by the appointment of a receiver *(Clayton v. Allen,* 93 So. 543, 207 Ala. 667); or under the provisions of Title 7, Sections 302, 309, 315 and 316 of the Alabama Code (Appendix F (iv), infra, page 50). True, as held in *Priebe,* an Alabama court has no jurisdiction to seize property by a preliminary mandatory injunction, but, in the light of *Guaranty* and *Beacon,* if an Alabama court has no such jurisdiction, neither does the Federal court sitting there.

(c) THERE ARE NO SUCH "WELL-RECOGNIZED EQUITABLE

REMEDIES" IN THE FEDERAL COURT FOR THE SEIZURE OF PERSONAL PROPERTY AS HELD BY THE COURT OF APPEALS.

In holding that an injunction was "the only appropriate remedy" the court below departs from the specific restrictions upon Federal equitable jurisdiction set out in *Guaranty:* that the suit must be within the traditional scope of equity, that a plain, adequate and complete remedy at law must be wanting, that the constitutional right to trail by jury cannot be evaded, and that the outcome of litigation in the Federal court should be substantially the same, as it would be if tried in the State court. The holding is also in conflict with *Beacon Theaters v. Westover,* 359, U.S. 500, 3 Law Ed. 2d 988, 79 S. Ct. 948 in failing to recognize that in the Federal Court the legal claim for the recovery of property and a money judgment to collect a debt cannot be lost by blending it with a claim for an injunction; and that, because of the fusion of legal and equitable remedies in one action under the Federal Rules of Civil Procedure, both remedies may proceed side by side. Indeed, they must do so in order to preserve the constitutional right to trial by jury.

Finally, nothing has been more universally followed in the State or Federal courts than the traditional equity rule that mandatory injunctions are rarely issued, that interlocutory mandatory injunctions are even more rarely issued, and that neither is issued except upon the clearest equitable grounds, on undisputed facts, and except upon a clear showing of irreparable harm. *W. A. Mack, Inc. v. General Motors Corp.,* 7th Cir. 260 F. 2nd 2d 886; *Congress of Racial Equality v. Douglas* 318 F. 2d 95 (5th Cir.)

Since neither of these essentials is present here, the District court was without jurisdiction to issue the order complained of, or has clearly abused its discretion, if any exists here.

IV

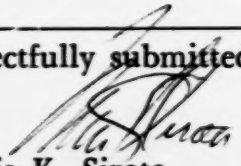
CONCLUSION

The Uniform Commercial Code is the result of the joint efforts of the American Law Institute and the National Conference of Commissioners on Uniform State Laws who have labored on the Code together from 1943 until its final adoption by both bodies in September, 1951. It has since been adopted, with some slight variations, by every state, except Louisiana, thus governing commercial transactions throughout the United States. It was designed to make uniform the law among the various jurisdictions.

The decision by the Court of Appeals here in question casts a cloud upon the uniformity of the interpretation and enforcement of this important law as between State and Federal courts, which should be resolved by this court.

In the face of such clear error by the Court of Appeals, affecting the constitutional rights of Petitioner, and the nationwide exceptional importance of the questions involved, this Petition for Writ of Certiorari should be granted.

Respectfully submitted.



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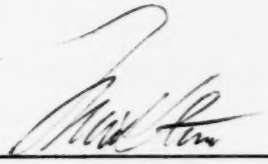
PROOF OF SERVICE

I, Morris K. Sirote, a member of the Bar of this Court, and of counsel for Petitioner herein, hereby certify that I have served four copies of the foregoing Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit on the Respondents herein, Clark Equipment Company, a corporation, Clark Credit Corporation, a corporation, and Clark Rental Corporation, a corporation, by mailing four copies of the same to the Honorable James C. Barton, counsel for Respondents, by depositing the same in a United States mail box, with first class postage prepaid, addressed to him at his post office address in the Bank for Savings Building, Birmingham, Alabama, on this the 3rd day of March, 1971.



Morris K. Sirote
Counsel for Petitioner

APPENDIX A

OPINION OF THE COURT OF APPEALS IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 28725

CLARK EQUIPMENT COMPANY, ET AL,
Plaintiffs-Appellees,

versus

ARMSTRONG EQUIPMENT COMPANY, ET AL,
Defendants-Appellants.

Appeal from the United States District Court for the Northern District of Alabama

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(September 1, 1970)

Before JONES, WISDOM and COLEMAN, Circuit Judges.

JONES, Circuit Judge: In 1965 the State of Alabama enacted the Uniform Commercial Code, Code of Alabama, Title 7A, to become effective January 1, 1967. Among its provisions is the following:

> "Default; procedure when security agreement covers both real and personal property. — (1) When a debtor is in default under a security agreement, a secured party has the rights and remedies provided in this Part and except as limited by subsection (3) those provided in the security agreement. He may reduce his claim to judgment, foreclose or otherwise enforce the security interest by any available judicial procedure. . . ." Code of Ala., Title 7A, § 9-501.

Armstrong Equipment Company, an Alabama corporation, the appellant, was indebted to Clark Equipment Company, a Delaware corporation, and its subsidiaries, one a corporation of Delaware and another a corporation of Michigan, collectively called Clark, the appellees, in an amount of something more than $1,800,000 and executed a security agreement dated January 30, 1967, which created a lien, referred to in the Code as a security interest, upon heavy equipment which for the most part was road building equipment and parts. Much of the equipment was leased to others and was being used by the lessees. The equipment, both that which was leased and that which was not, was located in the States of Alabama, Florida, Georgia, Mississippi and Tennessee. The security agreement covered the lessor's interest in the leases. The security agreement provided, among other things, that:

> "If any of the events of default specified herein shall occur, all amounts due or to become due hereunder shall accelerate and become immediately due and payable without notice or demand and Clark, Credit, Rental or Leasing may exercise and shall have any and all rights and remedies accorded to them by the Uniform Commercial Code as in effect from time to time under applicable state law. In addition, they may require borrower to assemble the

collateral and make it available to them at a place to be designated by them which is reasonably convenient to all parties. As to any collateral which is rented to a customer of borrower; Clark, Credit, Rental or Leasing shall be deemed to have taken possession of borrower's interest in such collateral by giving notice to the lessee of such collateral that Clark, Credit, Rental or Leasing has acquired borrower's interest. Where reasonable notice is required to take action under applicable law, it is agreed that reasonable notice shall mean notice sent to borrower at least ten (10) days before the time of sale or disposition of the collateral by any of the methods provided in Section 15.1 hereof. Borrower shall pay Clark, Credit, Rental or Leasing on demand any and all expenses, including reasonable attorney's fees, incurred or paid by Clark, Credit, Rental or Leasing in protecting or enforcing any of their rights hereunder."

Clark brought an action to foreclose against Armstrong in the United States District Court for the Northern District of Alabama, and sought the protective relief of a mandatory injunction requiring Armstrong to assemble the equipment, and other property upon which a lien was asserted (excluding the leased equipment but including the leases), and make it available to Clark. The Code provides:

"Secured party's right to take possession after default. — Unless otherwise agreed a secured party has on default the right to take possession of the collateral. In taking possession a secured party may proceed without judicial process if this can be done without breach of the peace or may proceed by action. If the security agreement so provides the secured party may require the debtor to assemble the collateral and make it available to the secured

> party at a place to be designated by the secured party which is reasonably convenient to both parties. . . ." Code of Ala., Title 7A, § 9-503.

The Uniform Commercial Code permits and the security agreement here provides for the transforming of that which was a lien in the nature of a conventional mortgage lien into a pledge. It might be observed in passing that the law in Alabama, as in most States, prior to the adoption of the Uniform Commercial Code, favored debtors and after the adoption of the Code, the law placed the creditor in the favored position.

The court entered a preliminary injunction, after a hearing, finding that Armstrong was in default in making payments as required by the security agreement and directed that Armstrong make payments in accordance with the agreement. Clark was required to post a $5,000 bond. Thereafter, following a further hearing, the court issued another injunctive order requiring Armstrong to assemble the described equipment, much of which was in States other than Alabama, and make it available to Clark. Clark was directed to sell the collateral and account for the proceeds. Clark was ordered to post a bond in the amount of $1,000,000. Armstrong was given the option of posting a bond in a like amount and retain possession of the equipment and other property covered by the security agreement. Clark posted the required bond. Armstrong has appealed from this mandatory injunction.

The principal argument of the appellant, Armstrong, and the only one which requires our consideration, is that courts are without jurisdiction to grant the injunctive relief for the enforcement of the covenant of Armstrong in the security instrument to assemble and make available to Clark the property covered by the lien. It is urged that this is

particularly true with respect to a Federal district court.

Armstrong does not challenge the validity of the part of the Code which provides for an agreement authorizing the creditor, in the event of a default, to require that the property upon which a lien has been created to be assembled and made available to the creditor. It urges that resort must be had to the State remedy of detinue in order to enforce the substantive right created by the agreement made pursuant to the Code.

It may be that, under some circumstances, the remedy of detinue would be available to enforce the covenant of a debtor to assemble and make available to the creditor the collateral subject to a security agreement given pursuant to the provisions of the Uniform Commercial Code. Rule 64, Fed. Rules Civ. Proc. 28 U.S.C.A. In this case, where the equipment was in five States, no one possessory action would provide an adequate remedy. Neither the Federal Rules of Civil Procedure nor the Erie Doctrine deprive Federal courts in diversity cases of the power to enforce State-created substantive rights by well-recognized equitable remedies even though such remedy might not be available in the courts of the State. See *Guaranty Trust Co. v. York*, 326 U.S. 99, 89 L.Ed. 2079, 65 S.Ct. 1464, 160 A.L.R. 1231.

The Alabama Law authorized and the security agreement required Armstrong to assemble and make available to Clark the property subject to the lien. This is something different from a right of Clark, the creditor, to take possession, a right which might be, under some circumstances, enforced by detinue. It may be noted that the Code provides for the enforcement of the provision to assemble and make available to the creditor by action but does not attempt to specify the kind of action. The injunctive relief granted was not only within the court's jurisdiction but was, we think, the

only appropriate remedy for the enforcement of the terms of the agreement in view of the location of the property in five different States. See *Stern v. South Charter Tube Co.*, 396 U.S. 606, 20 L.Ed.2d 177, 88 S.Ct. 1332.

It should be noted that nothing is here decided except as to the injunction before the Court on appeal. The merits are not before the Court.

The district court did not commit error in granting the mandatory injunction directing Armstrong to assemble the equipment and other property subject to the security agreement and make it available to Clark. The judgment of the district court is

AFFIRMED.

APPENDIX B

JUDGMENT OF THE COURT OF APPEALS

United States Court of Appeals

FOR THE FIFTH CIRCUIT

OCTOBER TERM, 1969

No. 28725

D. C. Docket No. CA 69-385

CLARK EQUIPMENT COMPANY, ET AL,
Plaintiffs-Appellees,

versus

ARMSTRONG EQUIPMENT COMPANY, ET AL,
Defendants-Appellants.

Appeal from the United States District Court for the Northern District of Alabama

Before JONES, WISDOM and COLEMAN,
Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Alabama, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed;

It is further ordered that defendants-appellants pay to

plaintiffs-appellees, the costs on appeal to be taxed by the Clerk of this Court.

September 1, 1970

Issued As Mandate December 15, 1970.

APPENDIX C

ORDER DENYING PETITION FOR REHEARING

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 28725

CLARK EQUIPMENT COMPANY, ET AL,
Plaintiffs-Appellees,

versus

ARMSTRONG EQUIPMENT COMPANY, ET AL,
Defendants-Appellants.

ON PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC
(Opinion Sept. 1, 1970, 5 Cir., 1970, ____F. 2d____).

(December 7, 1970)

Before JONES, WISDOM and COLEMAN, Circuit Judges.

PER CURIAM: The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be

polled on rehearing en banc, (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the Petition for Rehearing En Banc is DENIED.

APPENDIX D

DECREE OF THE DISTRICT COURT DATED JUNE 27, 1969

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DIRSTRICT OF ALABAMA,
SOUTHERN DIVISION

CLARK EQUIPMENT COMPANY, a corporation; CLARK EQUIPMENT CREDIT CORPORATION, a corporation; and CLARK RENTAL CORPORATION, a corporation,

Plaintiffs,

v.

ARMSTRONG EQUIPMENT COMPANY, a corporation; and SOUTHERN SCRAP MATERIAL COMPANY, LTD., a corporation,

Defendants.

Civil Action
No. CA 69-385

THIS CAUSE coming on to be heard on the motion of plaintiffs for a preliminary injunction upon the verified complaint and the evidence taken in open court; and the Court having heard the testimony of witnesses, considered the documentary evidence, and having heard argument of counsel; and the Court having jurisdiction of this Cause for the issuance of a preliminary injunction, and being fully advised in the premises; it finds that the defendant, Armstrong Equipment Company, a corporation, entered into a Security Agreement, dated January 30, 1967, with the plaintiffs, in which Armstrong granted to the plaintiffs a security

interest, as contemplated by the Uniform Commercial Code, in the products, equipment and machinery, parts and collateral purchased by Armstrong from plaintiff, Clark Equipment Company, to secure the payment of liability of all obligations from Armstrong to plaintiffs; Armstrong agreed to pay the unpaid balance on each item, as to which a security interest was granted, thirty (30) days after the date of sale thereof, or when payment was received, whichever event should first occur; the Court finds that defendant, Armstrong purchased from Clark Equipment Company, and granted a security interest therein to the plaintiffs, the equipment and machinery described in Exhibit A hereto; and, thereafter, during the months of April and May, 1969, Armstrong sold four (4) items described in Exhibit A, viz., two (2) Michigan 275 Tractor Shovels, Serial Numbers 9AJC151 and 9AJC104, respectively; one (1) Michigan 125 Tractor Shovel, Serial Number 11AFG141; and one (1) Michigan 475 Tractor Shovel, Serial Number 2AYC138, and collected the sales price thereon during the month of May, 1969, as to which plaintiffs had a security interest in the amount of $224,069.86; defendant Armstrong refused and failed to pay the plaintiffs, thereby defaulting the terms of the Security Agreement; thereupon plaintiffs demanded possession of the machinery and equipment described in Exhibit A, with the exception of that sold, as herein described, together with the parts inventory as to which plaintiffs were granted a security interest by defendant, Armstrong, which demand defendants have refused; the Court finds that the balance due plaintiffs on that portion of the property described in Exhibit A as "Floor Plan," is in the amount of $631,759.42, and the balance due plaintiffs on that portion of machinery and equipment described in Exhibit A as "Rental Fleet" is in the amount of $1,153,-705.76; that, on demand, defendants have refused to deliver to the plaintiffs possession of the rental contracts thereon,

or to pay the balance due thereon; pursuant to the Security Agreement plaintiffs have a security interest in the parts inventory of the defendant, Armstrong, possession of which has been demanded by plaintiffs and refused by the defendants; there is a total balance due plaintiffs of $1,806,403.53, plus interest; the Court finds that the equipment and machinery, described in Exhibit A as "Floor Plan" is in the possession of defendants and located in Birmingham, Montgomery and Mobile, Alabama; that the equipment and machinery described in Exhibit A as "Rental Fleet" is partially in possession of defendant, Armstrong, at said three locations, and the balance is in possession of lessees at various locations in the State of Alabama, Georgia, Florida, Mississippi, and Tennessee, with respect to which the defendant, Armstrong, has, in each instance, a rental contract or may demand of each lessee a rental contract as to which the plaintiffs have a security interest pursuant to the Security Agreement; the parts inventory, consisting of service and replacement parts, kits of parts for repair or modification, and certain accessory items, for use on equipment and machinery, which parts, kits or accessories are manufactured and/or sold by Clark Equipment Company which is impractical to itemize, but as to which the Court finds the plaintiffs have a security interest, is in the possession of defendant, Armstrong, in the cities of Birmingham, Montgomery, and Mobile, Alabama.

The Court finds that the defendant Armstrong is in default of the terms of the Security Agreement, and will continue to default thereon unless restrained by Order of this Court; and, it appearing to the Court that the plaintiffs have the right to possession and the rights and remedies provided by the Uniform Commercial Code, as set out in Part 5 of Article 9, §9-501, et seq., and will suffer irreparable injury, loss, or damage, unless the defendants are re-

strained by Order of this Court from violating the terms and conditions of the Security Agreement pending final hearing which this Court is accelerating to be set September 3, 1969, and to maintain a viable status quo, it is, therefore,

ORDERED, ADJUDGED and DECREED that, pending further Order of this Court the defendant, Armstrong, its respective officers, agents, servants, employees, attorneys, and all persons in active concert and participation with said defendant be, and they hereby are, restrained and enjoined to and from:

Violating the terms, covenants and conditions of the Security Agreement between the plaintiffs and the defendant, Armstrong, and, specifically, to remit to plaintiffs the proceeds of any sale of any machinery and equipment, the terms of which sale must be approved, in writing, by Bernard E. Doepker, representative of the plaintiffs, which approval shall not be unreasonably withheld, in which plaintiffs have a security interest, upon receipt of the purchase price of any such machinery and equipment, or within thirty (30) days, whichever event shall first occur; and to segregate, hold in trust, and account to this Court upon final hearing, the proceeds of sale of any parts on which plaintiffs have a security interest, and with respect to the Rental Fleet on lease or in defendant Armstrong's possession to fully perform all terms, covenants and conditions, including, but not limited to, remitting periodic payments to the plaintiffs when due, according to the terms of the Security Agreement, and any underlying agreements with respect thereto; it is further

ORDERED, ADJUDGED, and DECREED that the plaintiffs file with the Clerk of this Court, as a condition to the issuance of this injunction, plaintiffs' bond, with corporate surety, in the amount of $5,000.00, conditioned to pay any costs or damages which may be incurred by any

party which is found to have been wrongfully enjoined or restrained by said injunction. It is further

ORDERED, ADJUDGED and DECREED that this Order shall become effective on and after 3:00 o'clock p.m., on the 27th day of June, 1969. It is further

ORDERED, ADJUDGED and DECREED that the final hearing on the merits of this case be, and the same hereby is, accelerated and set for hearing at 9:00 o'clock a.m., on September 3, 1969. It is further

ORDERED, ADJUDGED and DECREED that defendants be served with a copy of this Order by delivering this Order to counsel of record for the defendants, and the United States Marshal is hereby directed to serve any persons in active concert or participation with said Armstrong known, or made known, to the Marshal immediately.

DONE THIS 27th day of June, 1969.

Seybourn H. Lynne
UNITED STATES DISTRICT JUDGE

SEAL

APPENDIX E

DECREE OF THE DISTRICT COURT DATED SEPTEMBER 4, 1969

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA,
SOUTHERN DIVISION

CLARK EQUIPMENT COMPANY, a corporation; CLARK EQUIPMENT CREDIT CORPORATION, a corporation; and CLARK RENTAL CORPORATION, a corporation,

Plaintiffs,

v.

ARMSTRONG EQUIPMENT COMPANY, a corporation; and SOUTHERN SCRAP MATERIAL COMPANY, LTD., a corporation,

Defendants.

Civil Action
No. CA 69-385

THIS CAUSE coming on to be heard, pursuant to the Order of this Court dated June 27, 1969, which Order contemplated giving the parties a period of time until September 3, 1969, to resolve their differences, failing which the Court would determine the conditions of granting plaintiffs the temporary relief prayed for, and it appearing to the Court that the parties have been unsuccessful in settling their differences and that the defendant, Armstrong Equipment Company, should be required to assemble and make available and deliver possession to the plaintiffs, pursuant to the security agreement between the parties

and §9-503 of the Uniform Commercial Code, for sale, lease, or other disposal the equipment described in Exhibit A hereto, which is in possession of Armstrong, and contracts with respect to the equipment in possession of lessees, and the parts inventory manufactured and/or sold by Clark Equipment Company in which plaintiffs have a security interest, all according to and pursuant to the strict observance of the provisions of §9-504 of the Uniform Commercial Code in a commercially reasonable manner, and further, the defendant, Armstrong Equipment Company, should be required to pay into this Court all rental monies collected by said Armstrong on and after 3:00 o'clock p.m. June 27, 1969, with respect to any of the equipment described in Exhibit A hereto, it is, therefore

ORDERED, ADJUDGED, and DECREED, and, pending further order of this Court, the defendant, Armstrong Equipment Company, its respective officers, agents, servants, employees, and all persons in active concert and participation with them, be, and they hereby are, ordered and enjoined to assemble the equipment described in Exhibit A, excluding equipment in possession of lessees, and the parts inventory in which plaintiffs have a security interest, which have not been sold prior to the date of this Order, on the premises of the defendant, Armstrong, in the cities of Birmingham, Montgomery and Mobile, Alabama, segregated from equipment, machinery and parts of other manufacturers, there to be made available and possession delivered to plaintiffs for sale, lease or other disposal, according to the strict provisions, and in a commercially reasonable manner, pursuant to §9-504 of the Uniform Commercial Code; prior to and during such sale, lease or other disposal plaintiffs, their respective agents, servants and employees shall have access to and upon defendants' premises during business hours; said assembly to be completed and the equipment

and machinery and parts made available and possession delivered to plaintiffs forthwith; the same to be removed from defendants' premises on or before October 1, 1969, unless the time therefor is extended by further Order of this Court; while any of said equipment and parts inventory covered by this Order remain on the premises of the defendant, Armstrong Equipment Company, it shall be deemed and by this Order is in the legal possession of the plaintiffs. It is further

ORDERED, ADJUDGED and DECREED, pending further Order of this Court that Armstrong Equipment Company, its respective officers, agents, servants, employees, and all persons in active concert and participation with them, be and they hereby are, ordered and enjoined to deliver forthwith to the plaintiffs the rental contracts on the Rental Fleet described in Exhibit A, pursuant to the terms of the Security Agreement, and plaintiffs be, and they hereby are, permitted and directed to notify lessees of said equipment that plaintiffs have acquired defendants' interest, and to remit rental payments to plaintiffs, which plaintiffs shall account for at the same time the accounting is made with respect to the equipment sold, leased, or otherwise disposed of as provided in this Order; and that defendant, Armstrong Equipment Company, shall forthwith remit or cause to be remitted to the Clerk of this Court any sums heretofore on and after 3:00 o'clock p.m. June 27, 1969, paid to it for the rental or sale of said rental equipment. It is further

ORDERED, ADJUDGED and DECREED that plaintiffs conduct the sale, lease or disposal of the property ordered to be assembled by the defendants, in a reasonably commercial manner, pursuant to §9-504, et seq., and to file with this Court, within thirty (30) days after completion thereof, its accounting of the proceeds. It is further

ORDERED, ADJUDGED and DECREED that this Order shall become effective on and after 10:00 o'clock a.m.

on the 9th day of September, 1969, upon the plaintiffs' filing with the Clerk of this Court as a condition to the issuance of this Order, plaintiffs' bond with corporate surety in the amount of $1,000,000.00 conditioned to pay any costs and damages, including damages for detention, if any, which may be incurred by any party which is found to be wrongfully enjoined or restrained by said injunction and have the property or value thereof forthcoming within (30) days after judgment if the plaintiffs shall fail to recover the same in said suit, unless, the defendant, Armstrong Equipment Company files with the Clerk of this Court on or before 10:00 o'clock a.m. September 9, 1969, defendants' bond, with corporate surety, in the amount of $1,000,000.00, conditioned to pay any costs and damages, including damages for detention, if any, which may be incurred by any party-plaintiff and have the property or its value forthcoming within thirty (30) days after judgment in case any party-plaintiff is successful in this cause. In the event defendant, Armstrong Equipment Company files its forthcoming bond as herein provided, said defendant will not be required to obey the mandates of this Order, but the Order of this Court dated June 27, 1969, shall remain in effect. It is further

ORDERED, ADJUDGED and DECREED that this Order is not adjudicatory of and shall be without prejudice to any defense or defenses that the defendants may have upon final hearing on the merits of this case. It is further

ORDERED, ADJUDGED and DECREED that contemporaneously with the filing and approval of the bond by plaintiffs, as hereinabove provided, plaintiffs shall submit for approval of this Court a plan for the sale, lease or other disposal of the property herein described. It is further

ORDERED, ADJUDGED and DECREED that defendants be served with a copy of this Order by delivering this

Order to counsel of record for the defendants, and the United States Marshal is hereby directed to serve any persons in active concert or participation with said defendants known, or made known, to the Marshal immediately.

DONE this 4th day of September, 1969.

/s/ Seybourn H. Lynne

UNITED STATES DISTRICT JUDGE

APPENDIX F

STATUTES INVOLVED

(i) Sections 1-101, 1-102, 1-103, 1-201 (1), 1-201 (34), 9-501 (1), (2), (3), (5), and 9-503 of the Alabama Uniform Commercial Code, Title 7A Code of Alabama 1940, as Recompiled and Amended:

§1—101. Short title.—This Act shall be known and may be cited as Uniform Commercial Code.

§ 1—102. Purposes; rules of construction; variation by agreement.—(1) This Act shall be liberally construed and applied to promote its underlying purposes and policies.

(2) Underlying purposes and policies of this Act are

(a) to simplify, clarify and modernize the law governing commercial transactions;

(b) to permit the continued expansion of commercial practices through custom, usage and agreement of the parties;

(c) to make uniform the law among the various jurisdictions.

(3) The effect of provisions of this Act may be varied by agreement, except as otherwise provided in this Act and except that the obligations of good faith, diligence, reasonableness and care prescribed by this Act may not be disclaimed by agreement but the parties may by agreement determine the standards by which the performance of such obligations is to be measured if such standards are not manifestly unreasonable.

(4) The presence in certain provisions of this Act of the words "unless otherwise agreed" or words of similar import does not imply that the effect of other provisions may not be varied by agreement under subsection (3).

(5) In this Act unless the context otherwise requires

(a) words in the singular number include the plural, and in the plural include the singular;

(b) words of the masculine gender include the feminine and the neuter, and when the sense so indicates words of the neuter gender may refer to any gender.

§ 1—103. Supplementary general principles of law applicable.—Unless displaced by the particular provisions of this Act, the principles of law and equity, including the law merchant and the law relative to capacity to contract, principal and agent, estoppel, fraud, misrepresentation, duress, coercion, mistake, bankruptcy, or other validating or invalidating cause shall supplement its provisions.

§ 1—201. General Definitions.—Subject to additional definitions contained in the subsequent Articles of this Act which are applicable to specific Articles or Parts thereof, and unless the context otherwise requires, in this Act:

(1) "Action" in the sense of a judical proceeding includes recoupment, counterclaim, set-off, suit in equity and any other proceedings in which rights are determined.

(34) "Remedy" means any remedial right to which an aggrieved party is entitled with or without resort to a tribunal.

§ 9—501. Default; procedure when security agreement covers both real and personal property.— (1) When a debtor is in default under a security agreement, a secured party has the rights and remedies provided in this Part and except as limited by subsection (3) those provided in the security agreement. He may reduce his claim to judgment, foreclose or otherwise enforce the security interest by any available judicial procedure. If the collateral is documents the secured party may proceed either as to the documents or as to the

goods covered thereby. A secured party in possession has the rights, remedies and duties provided in Section 9—207. The rights and remedies referred to in this subsection are cumulative.

(2) After default, the debtor has the rights and remedies provided in this Part, those provided in the security agreement and those provided in Section 9—207.

(3) To the extent that they give rights to the debtor and impose duties on the secured party, the rules stated in the subsections referred to below may not be waived or varied except as provided with respect to compulsory disposition of collateral (subsection (1) of Section 9—505) and with respect to redemption of collateral (Section 9—506) but the parties may by agreement determine the standards by which the fulfillment of these rights and duties is to be measured if such standards are not manifestly unreasonable:

(a) subsection (2) of Section 9—502 and subsection (2) of Section 9—504 insofar as they require accounting for surplus proceeds of collateral;

(b) subsection (3) of Section 9—504 and subsection (1) of Section 9—505 which deal with disposition of collateral;

(c) subsection (2) of Section 9—505 which deals with acceptance of collateral as discharge of obligation;

(d) Section 9—506 which deals with redemption of collateral; and

(e) subsection (1) of Section 9—507 which deals with the secured party's liability for failure to comply with this Part.

(5) When a secured party has reduced his claim to judgment the lien of any levy which may be made upon his collateral by virtue of any execution based upon the judgment shall relate back to the date of the perfection of the security

interest in such collateral. A judicial sale, pursuant to such execution, is a foreclosure of the security interest by judicial procedure within the meaning of this section, and the secured party may purchase at the sale and thereafter hold the collateral free of any other requirements of this Article.

§ 9—503. Secured party's right to take possession after default.—Unless otherwise agreed a secured party has on default the right to take possession of the collateral. In taking possession a secured party may proceed without judicial process if this can be done without breach of the peace or may proceed by action. If the security agreement so provides the secured party may require the debtor to assemble the collateral and make it available to the secured party at a place to be designated by the secured party which is reasonably convenient to both parties. Without removal a secured party may render equipment unusable, and may dispose of collateral on the debtor's premises under Section 9—504.

(ii) Sections 918 through 931 Title 7, Code of Alabama 1940, as Recompiled and Amended, dealing with the recovery of personal chattels in specie:

§ 918. (7389) (3778) (1474) (2717) (2942) (2593) (2192) Writ of seizure in detinue.—When a suit is brought for the recovery of personal chattels in specie, if the plaintiff, his agent, or attorney, make affidavit that the property sued for belongs to the plaintiff, and execute a bond in such sum, and with such surety as may be approved by the clerk, with condition that if the plaintiff fail in the suit, he will pay the defendant all such costs and damages as he may sustain by the wrongful complaint, it is the duty of the clerk to indorse on the summons that the sheriff is required to take the property mentioned in the complaint into his possession, unless the defendant give bond payable to the plaintiff, with sufficient surety, in double the value of the property, with con-

dition that if the defendant is cast in the suit he will, within thirty days thereafter, deliver the property to the plaintiff, and pay all costs and damages which may accrue from the detention thereof.

§ 919. (7390) (3779) When property not taken plaintiff may elect to recover damages.—If the officer fail to find and take the goods and chattels, he may summon the defendant to appear as in other cases, and the plaintiff may then declare and prosecute the action alone for the recovery of the value of the property and damages for the taking and detention of the property as if he had thus commenced his action by summons and complaint.

§ 920. (7391) (3780) (1475) (2719) (2943) (2594) (2193) Provisions for delivery of property to parties.—If the defendant neglect for five days to give such bond, the property sued for must be delivered to the plaintiff, on his giving bond with sufficient surety, in double the value of the property, payable to the defendant, with condition to deliver the property to the defendant within thirty days after judgment, in case he fail in the suit, and to pay all damages for the detention of the property and costs of suit. If the plaintiff fail to give such bond for five days after the expiration of the time allowed the defendant, the property must be returned to the defendant.

§ 921. (7392) (3781) (1476) (2719) (2944) (2595) (2194) Assessment of value and damages.—Upon the trial, the jury must, if they find for the plaintiff, assess the value of each article, separately, if practicable, and also assess damages for its detention; if they find for the defendant, they must in like manner assess the value, and, if in the possession of the plaintiff, assess damages for its detention. Judgment against either party must be for the property sued for, or its alternate value, with damages for its detention of the time of trial.

§ 921 (1). When plaintiff may recover attorney's fee.—Any person claiming to be the owner of lost or stolen property found in the possession of another may, if such person continues to withhold such property five days after demand made therefor and after reasonable proof of his ownership has been made to such holder sue for and recover in a suit in detinue filed against the person withholding said property, a reasonable attorney's fee for the services of his attorney in such suit if such claimant prevails therein, upon proof of the reasonable value of such services, which attorney's fee shall be included in the judgment rendered in the suit and which shall be in addition to any other damages recoverable in such cases. (1951, p. 1340, appvd. Sept. 11, 1951.)

§ 922. (7393) (3782) Executions.—If the party in whose favor the judgment is given be in possession of the property in controversy, he shall retain it, or if the property be in possession of the officer seizing it, he shall deliver it to the successful party, and a writ of fieri facias will issue for the damages and costs of suit; and if the property be in possession of the losing party, the execution shall command the sheriff to take the property in controversy and deliver it to the successful party, and if the property cannot be had, that he make the value thereof out of the goods and chattels, lands and tenements, of the party and his sureties, if any, against whom the judgment is rendered, and shall command that he so make the damages assessed and costs of the suit.

§ 923. (7394) (3783) (1479) (2721) (2945) (2596) (2195) Failure of unsuccessful party to deliver property.—If the unsuccessful party, who has given bond and taken the property into possession, fails, for thirty days after the judgment, to deliver the property, and to pay the damages assessed for the detention thereof, and the costs, the sheriff must upon the bond make return of the fact of such failure; and there-

upon the bond has the force and effect of a judgment, on which execution, garnishment or other process may issue against any or all the obligors therein for the alternative value of the property as assessed by the jury, and the damages assessed for its detention and the costs; if the property be delivered, and the damages assessed for its detention and the cost be not paid, the sheriff must upon the bond, make return of the fact, and execution, garnishment or other process must issue against any or all of the obligors for such damages and costs, or for either, as either may be unpaid.

§ 924. (7395) (3784) (1483) (2723) (2947) (2598) (2197) Delivery compelled by attachment or distringas.—Any party recovering specific property may compel its restoration when practicable, by a writ of distringas, or moving for an attachment.

§ 925. (7396) (3785) Form of writ of attachment or distringas and fieri facias.—The form of the writ of attachment or distringas and fieri facias mentioned in the preceding section, may be substantially as follows, though not exclusive of any other sufficient form:

State of Alabama,
County of .....

To any lawful officer of the county of.....:

You are hereby commanded to attach the specific personal property and deliver the same to A. B., which he recovered of C. D. on the .... day of ....., in the ..... court of said county, and which was therein adjudged to be delivered to said A. B., to wit: (describe the property), if the same may be had; or if the said C. D. secrete or remove the said property so that it cannot be attached by you and delivered to said A. B., then you are commanded to distrain

C. D. by all his real and personal estate in your county, so that thereon he do not lay hands, until he deliver to you or to A. B. the specific property mentioned above, recoverable of him by A. B., if the same may be had; but if not, then you shall cause to be made of such estate of C. D., the alternative price and value of said specific property, to wit: ..... dollars, together with .....dollars damages for the detention, and ..... dollars costs; and if the property be delivered, you will then cause to be made only the damages for detention and costs, and make due return of this writ to this court how you have executed the same.

....., Clerk

§ 926. (7397) (3786) One or more writs do not prevent issuance of others.—The issuance of any one or more of the writs of process for the enforcement of judgments in detinue shall not bar or prevent issuance of other or appropriate writs to enforce such judgments until there has been a satisfaction of the judgment.

§ 927. (7398) (3787) (1481) (2722) (2946) (2597) (2196) Bonds returned in ten days; penalty for neglect.—All bonds taken under this chapter must be returned within ten days thereafter to the clerk of the court in which the suit is pending; and on failure, the sheriff is liable to the successful party to the amount of the value of the property, and damages for its detention as assessed by the jury, with interest thereon from the rendition of the judgment, to be recovered on motion to the court in which such judgment was rendered, on three days' notice, or the sheriff may, at any time, be compelled, by attachment, to make such return.

§ 928. (7399) (3788) (1482) When plantiff is in possession and suit is dismissed or abated.—When the property sued for is in the possession of the plantiff, and the suit is dismissed or abated, the court shall cause a jury to assess the

alternate value of the property, and also the value of the hire or use thereof during the time it was in the possession of the plaintiff.

§ 929. (7400) (3789) (1477) (2720) Suit by mortgagee or vendor.—If the suit is by a mortgagee, or his assignee, against a mortgagor or one holding under him, or by a vendor who has made a conditional sale reserving the title until the entire purchase money shall be paid, or his assignee, against his vendee or one holding under him, the defendant may, upon suggestion, require that the jury ascertain the amount of the mortgage debt, or the unpaid balance of the purchase price of the article sold; and if the debt due is ascertained to be less than the value of the property sued for as assessed by the jury, judgment must be rendered for the property sued for, or if that is not to be had, then for the amount of the debt as ascertained by the jury. The court must also make an order that, if the debt so ascertained, interest and costs, be paid within thirty days, no execution or other process shall issue on the judgment; and on payment thereof to the plaintiff or to the clerk for his use, the clerk must, on the face of the record of the judgment, indorse the fact of such payment, and thereafter the plaintiff shall be deemed the unsuccessful party within the meaning of section 923 of this title.

§ 930. (7401) (3790) (1480) When suit is by mortgagee or vendor.—When the suit is by a mortgagee or by a vendor in a contract of conditional sale, or their assignee, against the mortgagor or the vendee, or one holding under them, and suggestion is made as provided in the preceding section, if the amount of the debt is ascertained to be less than the value of the property sued for, and the defendant has given bond and taken the property into his possession, and fails for thirty days after the judgment to deliver the property or pay the amount found to be due, to the sheriff, execution

may issue against the obligors in the bond for the amount of the debt assessed and the costs in like manner as provided in section 923 of this title.

§ 931. (7402) (3791) (1478) What may be pleaded in such case.—In any action under the provisions of this chapter brought by a mortgagee or by a vendor in a contract of conditional sale, or by their assignee, claiming title under such mortgagee or vendor in a contract of conditional sale, in addition to any defenses appropriate to the action of detinue, the defendant may plead any matter of defense, including usury, that he might have pleaded if the action had been on the debt, except the statute of limitations.

(iii) Sections 845 through 850 Title 7, Code of Alabama 1940, as Recompiled and Amended, dealing with Attachments:

§ 845. (6172) (2924) (524) (2929) (3252) (2927) (2503) For what demands issued.—Attachments may issue:

1. To enforce the collection of a debt, whether it be due or not, at the time the attachment is taken out.

2. For any moneyed demand, the amount of which can be certainly ascertained.

3. To recover damages for a breach of contract, when the damages are not certain or liquidated.

4. When the action sounds in damages merely.

§ 846. (6173) (2925) (525) (2930) (3253) (2938) (2504) Cases in which issued.—In the following cases attachments may issue:

1. When the defendant resides out of the state.

Cross references.—See notes to §§ 923, 929 of this title. Applied in Collier v. White, 97 Ala. 615, 12 So. 385.

2. When the defendant absconds.

3. When the defendant secretes himself so that the ordinary process of law cannot be served on him.

4. When the defendant is about to remove out of the state.

5. When the defendant is about to remove his property out of the state, so that the plaintiff will probably lose his debt, or have to sue for it in another state.

6. When the defendant is about fraudulently to dispose of his property.

7. When the defendant has fraudulently disposed of his property.

8. When the defendant has moneys, property, or effects, liable to satisfy his debts, which he fraudulently withholds.

§ 847. (6174) (2926) (526) (2931) (3254) (2929) (2505) By what officers issued.—In the first and second cases mentioned in the first section of this article, an attachment may be issued by any judge of the circuit court, or court of like jurisdiction, returnable to any county in the state: or by the clerk of the circuit court, judge of probate, or any justice of the peace or a notary public exercising the jurisdiction of a justice of the peace, within their respective counties; in the third and fourth cases, only by a judge of the circuit court, or court of like jurisdiction, or judge of probate, returnable to any county.

§ 848. (6175) (2927) (527) (2932) (3255) (2930) (2506) Oath to be made.—The officer, before issuing the attachment in the first two cases mentioned in the last section, must require the plaintiff, his agent, or attorney, to make oath of the amount of the debt or demand, and that it is justly due, or to become due, and that one of the causes

enumerated in the second section of this article exists; and that the attachment is not sued out for the purpose of vexing or harassing the defendant; and such oath must be reduced to writing and subscribed by the party making it.

§ 849. (6176) (2928) (528) (2933) (3256) (2931) (2507) Bond and surety also required.—Such officer must, when the attachment is sued out otherwise than upon the ground that the defendant is a nonresident, further require the plaintiff, his agent, or attorney, to execute a bond in double the amount claimed, with sufficient surety, payable to the defendant, with the condition that the plaintiff will prosecute the attachment to effect, and pay the defendant all such damages as he may sustain by the wrongful or vexatious suing out of such attachment. When the attachment is sued out upon the ground that the defendant is a nonresident, such officer shall issue the writ with or without a bond being given, as the plantiff may elect. If such attachment is issued without bond, that fact must be indorsed on the writ. Should the defendant, before the return day thereof, in person or through his agent or attorney, make an unqualified appearance in the cause, it is the duty of the clerk to issue notice to the plaintiff or his attorney of the fact of such appearance. Unless within five days after the service of such notice the plaintiff make bond payable to the defendant in double the amount sued for, such levy shall be discharged.

§ 850. (6177) (2929) (529) (2934) (3257) (2932) (2508) When additional affidavit required.—When an attachment is applied for in the cases provided for in the third and fourth subdivisions of the first section of this article, the judge, before issuing it, must require the plaintiff, his agent, or attorney, in addition to the affidavit and bond required in other cases, to make affidavit in writing of the special facts and circumstances, so as to enable him to determine the amount

for which a levy must be made; which sum may, at the discretion of the court, be reduced at the return term of the attachment, on affidavit of the defendant, and the levy released to the amount of such reduction.

(iv) Sections 302, 309, 315 and 316 Title 7, Code of Alabama 1940, as Recompiled and Amended, dealing with the issuance of Writs of Equitable Attachment, Ne Exeat, etc in Courts of Equity:

§ 302. Circuit Courts may also issue writs of attachment in equity proceedings, on legal demands, founded on any judgment or contract, express or implied, in such cases as attachments may issue in proceedings at law, which attachments operate only on the effects of the defendant held by an equitable title, or on demands owing by other persons, to which the defendant against whom the attachment issues is in equity entitled, whether due or not.

§ 309. Circuit judges, and registers of the court in which the bill is filed, may make all necessary orders for the issuing of writs of ne exeat and equitable attachments, and for the sale of personal property levied on, as in like cases from courts of law; the money arising from such sale to be paid to the register.

§ 315. Writs may also issue from the circuit court in equity matters on an original bill, or in aid of a suit pending in such court, by the order of any judge of the circuit court, or register, for the seizure of personal property, when the same is claimed under an equitable title, or when a decree is sought against the same, and is in danger of being wasted, carried beyond the jurisdiction of the court, or otherwise disposed of.

§ 316. The plaintiff in such case must sustain his claim by affidavit, and give bond with surety, payable to the defendant, in double the value of the property, to be ap-

proved by the register, conditioned to pay all damages the defendant may sustain by the wrongful or vexatious suing out of such writ.

(v) Alabama Equity Rule 118 adopting English Chancery Rules:

Rules of English chancery. In cases not covered by these rules, nor by decisions of the supreme court of Alabama, nor by statute, the practice in effect in the English Courts of Chancery prior to Judicature Act of 1873 (but not afterward) may be followed, so far as it can reasonably be applied, as funishing analogies rather than positive rules. But no needless repetition of parts of original bills shall be allowed in the recitals of original bills in the nature of supplemental bills, or of bills of revivor and supplement, or of other derivative bills or petitions, nor shall detailed recitals of prior proceedings be permissible; the design of these rules being to simplify and abbreviate procedure.

(vi) Sections 64 and 70 of the Federal Rules of Civil Procedure:

Rule 64. At the commencement of and during the course of an action, all remedies providing for seizure of person or property for the purpose of securing satisfaction of the judgment ultimately to be entered in the action are available under the circumstances and in the manner provided by the law of the state in which the district court is held, existing at the time the remedy is sought, subject to the following qualifications: (1) any existing statute of the United States governs to the extent to which it is applicable; (2) the action in which any of the foregoing remedies is used shall be commenced and prosecuted or, if removed from a state court, shall be prosecuted after removal, pursuant to these rules. The remedies thus available include ar-

rest, attachment, garnishment, replevin, sequestration, and other corresponding or equivalent remedies, however designated and regardless of whether by state procedure the remedy is ancillary to an action or must be obtained by an independent action.

Rule 70. If a judgment directs a party to execute a conveyance of land or to deliver deeds or other documents or to perform any other specific act and the party fails to comply within the time specified, the court may direct the act to be done at the cost of the disobedient party by some other person appointed by the court and the act when so done has like effect as if done by the party. On application of the party entitled to performance, the clerk shall issue a writ of attachment or sequestration against the property of the disobedient party to compel obedience to the judgment. The court may also in proper cases adjudge the party in contempt. If real or personal property is within the district, the court in lieu of directing a conveyance thereof may enter a judgment divesting the title of any party and vesting it in others and such judgment has the effect of a conveyance executed in due form of law. When any order or judgment is for the delivery of possession, the party in whose favor it is entered is entitled to a writ of execution or assistance upon application to the clerk.

(vii) Seventh Amendment to the Constitution of the United States:

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

APPENDIX G

PERTINENT PROVISIONS OF THE SECURITY AGREEMENT

2. DEFINITIONS.

2.2 Products—such new equipment and machinery are defined as "products" in the Sales Agreement, and used equipment and machinery of the same general type whether or not manufactured or offered for sale by CLARK.

2.6 Rental Contracts—contracts for the lease or rental or lease and maintenance or rental and maintenance of Products entered into between BORROWER and customers of BORROWER, with or without options to purchase or the right to renew.

2.7 Chattel Paper—shall have the meaning accorded it by the Uniform Commercial Code as in effect from time to time under applicable state law but shall not include Rental Contracts.

2.8 Collateral—Chattel Paper for which value is given by CLARK, CREDIT, RENTAL or LEASING and any and all Products, the acquisition of which has been financed by CREDIT or RENTAL, and any and all Parts.

9. REMEDIES.

If any of the events of Default specified herein shall occur, all amounts due or to become due hereunder shall accelerate and become immediately due and payable without notice or demand and CLARK, CREDIT, RENTAL or LEASING may exercise and shall have any and all rights and remedies accorded to them by the Uniform Commercial Code as in effect from time to time under applicable state law. In addition, they may require BORROWER to assemble the Collateral and make it available to them at a

place to be designated by them which is reasonably convenient to all parties. As to any Collateral which is rented to a customer of BORROWER: CLARK, CREDIT, RENTAL or LEASING shall be deemed to have taken possession of BORROWER'S interest in such Collateral by giving notice to the Lessee of such Collateral that CLARK, CREDIT, RENTAL or LEASING has acquired BORROWERS'S interest. Where reasonable notice is required to take action under applicable law, it is agreed that reasonable notice shall mean notice sent to BORROWER at least ten (10) days before the time of sale or disposition of the Collateral by any of the methods provided in Section 15.1 hereof. BORROWER shall pay CLARK, CREDIT, RENTAL or LEASING on demand any and all expenses, including reasonable attorney's fees, incurred or paid by CLARK, CREDIT, RENTAL or LEASING in protecting or enforcing any of their rights hereunder.